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11 IN THE UNITED STATES DISTRICT COURT
12 FOR THE NORTHERN DISTRICT OF CALIFORNIA
13 SAN FRANCISCO DIVISION

14 **DERRECK E. SUNDERLAND,**

Petitioner,

15
16 v.

17 **JAMES D. HARTLEY, Acting Warden,**

18 Respondent.
19

07-05345 CRB

**RESPONDENT'S REPLY TO
OPPOSITION TO MOTION
TO DISMISS**

Judge: The Honorable
Charles R. Breyer

20 Respondent moved this Court to dismiss Derreck Sunderland's Petition for Writ of Habeas
21 Corpus on the grounds that: (1) his Petition is moot because Sunderland received a subsequent
22 parole consideration hearing that comports with due process; (2) as to his challenge to his plea
23 agreement, his Petition is successive, and he failed to obtain an appellate order authorizing the
24 Court to consider his claim; and (3) his Petition involves questions of state law and do not entitle
25 him to federal habeas relief. Sunderland's contentions in opposition are without merit, and
26 Respondent's Motion should be granted.

27 First, Sunderland claims that his Petition is not moot because his May 2007 hearing also
28 violated due process. (Opp. to Mot. to Dismiss at 11-14.) Yet, Sunderland has received the only

1 effective relief that he can be granted — a new parole hearing that comports with due process.
 2 *See Benny v. U.S. Parole Comm'n*, 295 F.3d 977, 984-85 (9th Cir. 2002) (parole board must
 3 exercise discretion in determining whether an inmate is suitable for parole). If he wishes to
 4 challenge his 2007 hearing as violating due process, then it is a new claim and he must file a new
 5 petition.

6 Second, Sunderland asserts that his challenge to his plea agreement is not successive
 7 because his two petitions challenge different parole hearings and different aspects of his plea
 8 agreement. (Opp. to Mot. to Dismiss at 4-7.) But the basic thrust of Sunderland's claim is to
 9 again challenge the validity of his plea agreement. (*See generally*, Petn.)^{1/} Because Sunderland
 10 was required to obtain leave from the Ninth Circuit before bringing his successive petition to this
 11 Court (and the record indicates no such order), the Petition should be dismissed. 28 U.S.C. §
 12 2244(b)(3)(A); *see also Gonzalez*, 545 U.S. at 529.

13 Third, Sunderland attempts to frame his challenge to the Board of Parole Hearings'
 14 (Board) alleged failure to conduct a timely subsequent parole consideration hearing as a federal
 15 law issue. (Opp. to Mot. to Dismiss at 7-9.) This attempt is without merit. Sunderland's
 16 Petition challenges the construction of state statutes and regulations regarding the manner in
 17 which the Board conducts parole suitability hearings. As such, Sunderland's claims are
 18 predicated on state law and not cognizable in federal habeas corpus. 28 U.S.C. § 2254(a); *Rose*
 19 *v. Hodges*, 423 U.S. 19, 21 (1975); *Gutierrez v. Griggs*, 695 F.2d 1195, 1197-98 (9th Cir. 1983);
 20 *Langford v. Day*, 110 F.3d 1380, 1389 (9th Cir. 1996) (habeas petition may not transform a state
 21 law issue into a federal one merely by asserting a due process violation). Moreover, although
 22 Sunderland does not explain why *In re Rutherford* does not apply to him, his claims regarding
 23 the timeliness of his parole hearing is already being heard as a state-action in *In re Rutherford*,
 24 where the Marin County Superior Court has jurisdiction over all overdue parole consideration
 25 hearings. (*In re Rutherford*, Super. Ct. Marin County, 2004, No. SC135399A.)

26
 27 1. Similarly, the state courts have repeatedly rejected Sunderland's challenges to his plea
 28 agreement. (Mot. to Dismiss at Ex. C; Petn. at Ex. 1; *see In re Clark* (1993) 5 Cal. 4th 750, 767.)

1 For the reasons stated above and in Respondent's Motion to Dismiss, this Court should
2 grant the Motion.

3 Dated: June 20, 2008

4 Respectfully submitted,

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Sunderland v. Hartley**

No.: **07-05345 CRB**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On **June 20, 2008**, I served the attached

RESPONDENT'S REPLY TO OPPOSITION TO MOTION TO DISMISS

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Derreck Sunderland, C-84327

Avenal State Prison

P.O. Box 9

Avenal, CA 93204

in pro per

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **June 20, 2008**, at San Francisco, California.

M.M. Argarin

Declarant

M.M. Argarin

Signature